

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253

To: The Commission

PETITION FOR RECONSIDERATION
OF THE
NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.

Submitted by:

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O. J.

The National Association of Business and Educational Radio, Inc. ("NABER"), by its attorneys and pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. §1.106, hereby submits this Petition for Reconsideration with respect to certain actions taken by the Commission in both the "Second Report and Order/¹" ("Second Order") and "Third Report and Order/²" ("Third Order") in the above captioned proceeding. In support hereof, the following is shown:

Background

NABER is a national, non-profit trade association headquartered in Alexandria, Virginia. NABER represents the large and small businesses that use land mobile radio communications as an important adjunct to the operation of their businesses and that hold thousands of licenses in the private land mobile radio and paging services. NABER has six membership sections representing Users, Private Carrier Paging licensees, System Integrators, Technicians, Specialized Mobile Radio operators, and Site Owners and Managers.

In 1989, the Association for Private Carrier Paging ("APCP") was established by Private Carrier Paging ("PCP") providers under the auspice of NABER. Since that time, the Association expanded its membership to over 200 companies. This group has been actively involved in a variety of Commission proceedings, including filing Comments in PR Docket No. 88-548 (Frequency Coordination) and PR Docket No. 89-552 (Allocation of 220 MHz). **APCP** has developed committees which have met with Commission officials on several occasions to discuss issues of importance to **APCP**, and **APCP** committees are currently exploring means by which paging systems can more

¹ FCC 94-61, released April 20, 1994.

² FCC 94-98, released May 10, 1994.

efficiently share the scarce spectrum made available for private carrier paging.

NABER applauds the Commission's efforts to meet the statutory deadlines imposed by Congress on the implementation of competitive bidding. NABER also fullheartedly supports the use of auctions as a means of allocating commercial mobile radio services (CMRS) spectrum and anxiously awaits the first auctions to be held at the end of July. NABER opposes any delay in the first auctions because NABER does not believe that such a delay would serve the public interest.

NABER, however, is concerned that in striving to meet the unreasonable congressional deadline, the Commission has adopted a licensing scheme which runs afoul of the public interest and the Administrative Practices Act (APA). The public interest is never served when the bidders and ultimate providers of service to the public are unable to devise a business plan and auction strategy in advance. Without clear rules, bidders will be forced to guess and/or not participate in action. NABER's members plan to be active auction participants and need stability in the Commission's Rules in order to draft business plans, secure financing, and devise bidding strategies. NABER's members do not seek to delay the first auctions, in fact if the Commission could adopt a Public Notice declaring clear rules for the nationwide Narrowband PCS auction which did not leave any discretion during the auction, NABER would immediately withdraw its Petition for Reconsideration.

Furthermore, the Commission's Rules run afoul of the APA because they allow the Commission to circumvent the normal and historical notice and comment procedure which is so important to ensuring that the agency has not acted arbitrarily or capriciously in adopting new rules. The APA adds an additional

problem to competitive bidding situations because the Commission can ill afford to have the auction conclude, winners announced, and then the auction nullified through a court challenge by a losing party that the auction violated the APA. NABER's members need the certainty that a winning bid will secure the license. Without such certainty, bidders will be forced to factor that risk into their ultimate bid price.

Finally, without clear and concrete rules, the auction will not meet the needs of the Commission or Congress. At least one economist has opined that the touchstone of competitive bidding is clear and concrete rules which cannot change during the course of the auction.³ Without clear and concrete rules, bidders strategies may be upset leading to a form of winners curse.⁴ The success of the mobile communications industry has been based on relatively stable rules throughout its history. For instance, the last wholesale change to Part 22 occurred over a decade ago. Stability in the auction rules will lead to the same type of success for these new services.

On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") added a new section 309(j) to the Communications Act of 1934, as amended. This amendment to the Communications Act gave the Commission express authority to employ competitive bidding procedures to choose from among mutually exclusive applications for initial licenses.

³ NABER understands that Preston McAfee has met with Commission to discuss this very point.

⁴ When a strategy is upended and little time is given to devise a new strategy (as is the case when the auction goes from multiple rounds to final sealed bid), bidders will be forced to bid essentially on gut instinct. In the case of sealed bids, for instance, waiting 20 rounds to go to sealed bids is really no different than going to sealed bids to begin with.

On October 12, 1993, the Commission released a "Notice of Proposed Rule Making" ("NPRM")/⁵ wherein the general approach to implementing the Budget Act was summarized as follows:

We proposed certain broad criteria furthering the goals mandated by Congress any system we promulgate should be simple and easy to administer. Unnecessary complexity in conception or execution is likely to cause delay and frustrate Congress' intent to speed new services to the public. *Id.*, at para. 18.

In the NPRM, the Commission admitted that "[w]ith this rule making, we enter new and uncharted territory [f]or that reason, it is more important than usual that commenters give serious and thoughtful consideration to the issues we have raised and to bring to our attention those which we may have overlooked." *Id.*, at para. 176.

By virtue of the above-referenced Second Order and Third Order, the Commission has attempted to establish general rules and procedures and a choice of competitive bidding methods to be used for all auctionable services. However, in exercising its delegated authority in this area, the Commission has applied an overly broad use of its administrative discretion which may create flaws in the adopted competitive bidding schemes which will ultimately prohibit good business judgment to be exercised by prospective bidders in the auctions. By adopting a broad degree of discretion that is outside the normal course of rule making, the Commission states that it has the authority in this area of regulation to (1) change the auction rules for any particular service in mid-stream, and/or (2) issue rules for any future auctions by "Public Notice" without any opportunity for public comment or any other meaningful input from the public. See e.g., *Second Order at*

⁵ FCC 93-455.

paras. 68, 164, 179; Third Order at paras. 16, 20, 31, 32, 34, 35.

In adopting such an approach, the Commission has created an environment of uncertainty which will not only prevent meaningful input from the very parties who will actually service the public but also delay the rapid deployment of such services since it is likely that such auction methods will be challenged as arbitrary and capricious. As will be shown below, the Commission has sufficient time to refine its rules prior to commencement of any auction -- without delaying the auctions already announced or planned. In exercising its delegated authority, it would be prudent for the Commission to expeditiously address the issues focused upon herein. It is not NABER's intention here to delay the implementation of the Commission's competitive bidding procedures. Nor does NABER seek to push these issues to the brink of litigation. Rather, the Commission must acknowledge that there are a number of problems and concerns with the new auction procedures that hopefully can be cured prior to the commencement of the recently announced IVDS and Narrowband PCS auctions. The public interest would be served if the Commission immediately addressed the issues raised in this petition and refined the new competitive bidding process accordingly. NABER does not seek an overhaul of the newly adopted procedures. However, certain refinements are necessary, which should be expeditiously addressed.

Certain New Rules Create Harmful Uncertainty

In the Second Order, the Commission has resolved not to decide certain aspects of the competitive bidding design, or procedural matters, until the auction process commences. Rather, certain auctions will proceed on a trial-and-error basis. For example:

68. In this section, we adopt simultaneous multiple round auctions as our primary auction methodology However, our analysis of the record ... has convinced us that there is no single competitive bidding design that is optimal for all auctionable services ... for these reasons, we shall not adopt a single auction design herein. Instead, we will identify a number of auction design options .. [and] ... adopt further Reports and Orders in this docket to adopt auction rules for each auctionable service or class of service.

164. Generally, we intend to adopt the following procedures for conducting auctions/
fn#120.

fn 120/ We may decide in the future to alter some or all of the procedures detailed herein, or to tailor them to specific service rules, after we have had an opportunity to assess their effectiveness.

179. As a general rule, we will not cap upfront payments because we need to ensure that those bidding on large numbers of licenses have the financial capability to build out those licenses and are bidding in good faith However, we reserve the right to institute caps in specific services if we are satisfied that an absolute dollar amount will provide sufficient deterrence against frivolous bidding and pernicious strategic bidding. Whether or not we adhere to our preset formula or institute a cap ...

In the Commission's Third Order, additional rules were adopted that, if implemented, would further perpetuate the uncertainty created by the Second Order:

16. In this section, we adopt simultaneous multiple round auctions as our primary auction methodology for narrowband PCS licenses.

20. however ... where license values are expected to be relatively low, bidder participation is expected to be limited or where the interdependence of licenses is less significant, we may decide to use alternative auction methods.
(emphasis added)

31. Because we plan to use simultaneous multiple round auctions for most narrowband PCS licenses, we believe it is necessary to impose a minimum bid increment to ensure that the narrowband PCS auctions conclude within a reasonable period of time.

32. We will most likely reduce the minimum bid increment only in the later bidding rounds, as bidding begins to come to a close./
fn#13

fn 13/ In oral sequential auctions the auctioneer may within its sole discretion establish and vary the amount of the minimum bid increment in each round of bidding.

34. For narrowband PCS we believe that a simultaneous stopping rule is preferable for the nationwide, regional and MTA licenses ... However, because of the large number of BTA licenses and their relatively low expected value, we may use either a hybrid stopping rule or allow markets to close individually in auctions for these licenses./
fn #15.

fn 15/ However, if we gain experience with auctions we may use a simultaneous stopping rule for the BTA licenses as well. Conversely ... we may employ a market-by-market or hybrid stopping rule for the higher value narrowband licenses.

35. In addition, we will retain the discretion to declare at any point in a multiple round auction that the auction will end after one additional round (or some other specified number of additional rounds).

If the Commission decides to change its minimum bid increment, stopping rules or any other aspect of the auction after the auction process for a particular service has commenced, all prior planning and strategy of the auction participants will be eroded or eliminated. However, as the above examples demonstrate, the Commission has reserved the right to change many of the auction rules at any time.

Throughout this rule making proceeding the Commission emphasized that its policy goal was to promote the rapid deployment of the auctionable services, and to permit prospective bidders the opportunity to participate in a simple, non-complex auction process whereby such participants would have the opportunity to maximize their strategy and create back-up strategies. A number of the rules announced

in the Second Order and Third Order frustrate the very policy goals that both Congress and the Commission have targeted.

In order to ensure that the competitive bidding process succeeds, the Commission must eliminate the imminent problems that some of its broadly stated rules will create. In summary, the Commission should clarify the following: First, it must remove the discretion of the agency to change the auction rules or procedures in mid-stream of a particular auction. Second, bidders need to know, specifically for a particular service auction, the firm rules which will apply in order to formulate its business plans and strategy. Third, future pronouncements of subsequent auctions should be made (either through an expedited Notice of Proposed Rule Making or under a Tentative Public Notice) to allow interested parties the opportunity to provide meaningful comment prior to setting the final auction rules for that service and frequencies. It being not only the experience of the Commission, but that of the affected participants who are potential bidders which need to be considered. Serious auction participants will require firm procedural rules that will not create any more risk than is already inherent in constructing and operating the new unproven communications systems for which they will bid./⁶

**The Commission's Improper Use of Discretion
Violates the Administrative Procedures Act**

Although the Budget Act empowered the Commission to establish rules and procedures to implement the new

⁶ The Commission should not ignore the fact that one of the reasons that auctions were adopted was to eliminate the delays that were often associated with the Commission's previous selection methods, such as hearings. The new selection process must be as "clean" as possible, and the implementation of the process should not deprive anyone of due process, or be subject to allegations of unfairness due to avoidable ambiguities.

competitive bidding selection process, the Commission must comply with certain overriding rules and regulations in asserting such delegated power. Since the Budget Act required the Commission to establish a rule making record prior to the issuance of these new rules, certain follow-up requirements must also apply.

Guiding insight is found in the House Report regarding the adoption of the APA, and §553 thereof:

The agency must keep a record and analyze and consider all relevant matter presented prior to the issuance of rules. The required statement of the basis and purpose of rules should not only relate to the data so presented but with reasonable fullness explain the actual basis and objective of the rule. *Sen. Doc. No. 248, 79th Cong., 2d Sess. 259 (1946).*

Should the Commission go forward and change bidding methods in mid-stream without prior public comment, the Commission would violate §553 of the Administrative Procedures Act ("APA"), 5 U.S.C. §553, for its failure to keep a record and analyze and consider all relevant matter regarding those new rules.

Congress certainly did not intend for the implementation of the new competitive bidding procedures to disrupt the implementation of the information superhighway. Just the opposite. Should the Commission fail to refine its process now, it is likely that such actions would later be viewed as an abuse of agency discretion, based upon arbitrary and capricious agency action. *See, §706 of the APA, 5 U.S.C. §706.* Where, as here, an agency scheme permits and encourages arbitrary and discriminatory actions, the entire process may

be deemed void for vagueness and unconstitutional. See e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).⁷

Conclusion

NABER respectfully requests that the Commission consider the merits of this petition and the serious issues raised herein. Should the Commission request additional information from NABER, or solicit its assistance in the establishment and operation of an industry group to expeditiously address these matters, NABER would readily cooperate.

Respectfully submitted,

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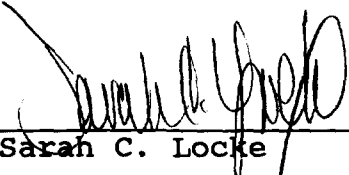
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⁷ In *U.S. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) a unanimous Supreme Court ruled that an agency decision to rescind or modify a rule is subject to review under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard. As part and parcel of this standard, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change." *Id.*

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. See, *State Farm*, 463 U.S. at 43. The Commission's statement that it has the power to change the auction rules in mid-stream clearly fails many of the elements of the Supreme Court's *State Farm* test. The Commission has not thoroughly justified a need to reserve the power to change the selection process without the opportunity of comment by interested parties to the proposed changes, nor has it provided any evidence whatsoever that such actions would not disrupt the auction process or not prejudice the participants if the rules "changed in mid-stream".

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 1994, a copy of the foregoing Petition for Reconsideration was served on the parties to this proceeding by first class mail, postage prepaid.



Sarah C. Locke